No. 15964

In the United States Court of Appeals for the Ninth Circuit

DAN O. HOYE, AS CONTROLLER OF THE CITY OF LOS ANGELES AND DAN O. HOYE, APPELLANTS

v.

UNITED STATES OF AMERICA AND ROBERT A. RIDDELL, DIRECTOR OF INTERNAL REVENUE, APPELLEES

On Appeal from the Order of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court rendered no opinion in making the order appealed from. (R. 27.)

JURISDICTION

This appeal arises out of proceedings by the United States to collect 1955 income taxes. On March 19, 1957, there was due and owing to the United States by Richard A. Westberg, the sum of $155.93 for 1955 income taxes. On the same date, the City of

Los Angeles was indebted to Richard A. Westberg, who was an employee of that city, in the sum of $158.78, his wages then due and owing but unpaid. (R. 4.) On the same date, the District Director of Internal Revenue, Robert A. Riddell, served upon the controller of the City of Los Angeles a notice of levy upon property in his possession belonging to Westberg. (R. 7-9.) A final demand for payment by the controller was made on June 25, 1957. (R. 9-12.) On September 10, 1957, the controller, Dan O. Hoye, appellant, filed in the District Court a complaint to quash the notice of levy and final demand, naming as defendants the United States, Riddell and Westberg. (R. 3-7, 12.) On November 8, 1957, the United States filed a motion to intervene with a proposed complaint in intervention to enforce the lien, and also a motion to dismiss the Hoye complaint. (R. 12-20.) On February 6, 1958, after a hearing on these motions, the District Court entered a formal order permitting intervention by the United States, and in its minutes, entered a direction granting the motion to dismiss the Hoye complaint. (R. 20-21.) A formal order granting the Government's motion to dismiss was entered on March 10, 1958 (R. 27), and the notice of appeal from this order was filed March 17, 1958 (R. 28-29). A motion to dismiss the appeal was denied July 2, 1958 by this Court. Jurisdiction of both this Court and the District Court is disputed; it is asserted by appellant to rest upon 28 U. S. C., Section 1291, with respect to this Court, and upon Sections 2201 and 2463, with respect to the District Court.

QUESTIONS PRESENTED

1. Whether the order of March 10, 1958, granting the Government's motion to dismiss appellant's complaint for a declaratory judgment and to quash the levy is an appealable order under 28 U. S. C., Section 1291 in view of the permission granted the United States to intervene with a suit to enforce the lien.

2. Whether, if it is an appealable order, the District Court correctly dismissed the complaint for lack of jurisdiction over the subject matter and the defendants.

STATUTES AND RULES INVOLVED

These are set forth in the Appendix, *infra.*

STATEMENT

The pertinent facts are not in dispute. On March 19, 1957, the District Director of Internal Revenue, Robert A. Riddell, served upon the controller of the City of Los Angeles a notice of levy (R. 7-9), which advised the controller that there was due, owing, and unpaid from Richard A. Westberg to the United States the sum of $155.93 for 1955 income taxes (R. 7), that demand had been made upon taxpayer to no avail, that the lien provided for by statute "now exists upon all property or rights to property belonging to the aforesaid taxpayer," and that demand was hereby being made upon the controller for such sum as he may be indebted to the taxpayer to be applied as a payment on the tax liability in whole or in part (R. 8).

The controller refused to pay over any sum to the United States, and on June 28, 1957, the District Director of Internal Revenue served a final demand upon the controller. (R. 9-12.) In this demand, the District Director advised the controller that he had previously been served with the notice of the levy, that the taxpayer still owed the United States $155.93 and that the levy had not been satisfied. (R. 9-10.) The controller's attention was called to the provisions of Section 6332 of the 1954 Code requiring a person in possession of property or rights to property, subject to levy, to surrender such property to the United States under penalty of personal liability in the sum equal to the value of the property not so surrendered but not in excess of the taxes. (R. 10-11.) The District Director renewed his demand upon the controller for any sums which he owed to the taxpayer at the time of the service of the notice of levy, and further advised the controller that if he did not comply with this final demand within five days from the date of its service, it will be deemed to be finally refused, and proceedings may be instituted by the United States as authorized by the statute. (R. 11.)

On September 10, 1957 (R. 12), the appellant Hoye, who was the controller of the City of Los Angeles, filed a complaint (hereinafter sometimes referred to as the Hoye complaint) in the District Court entitled (R. 3-7):

> Complaint to Quash a "Notice of Levy" and "Final Demand" Served on a Municipal Corporation by the Director of Internal Revenue

The complaint named as defendants the United States, Riddell and the taxpayer, Richard A. Westberg. (R. 3.) The complaint alleged the fact of the service of notice of levy of March 19, 1957, and it conceded (R. 4):

> That on said March 19, 1957, the City of Los Angeles was indebted to Richard A. Westberg in the sum of $158.78; that said sum was then payable to said Richard A. Westberg; that the plaintiff, Dan O. Hoye, as Controller of the City of Los Angeles, did thereupon hold said money because of the claim of the defendants the United States of America and Robert A. Riddell, Director of Internal Revenue.

The complaint goes on to allege the service of the final demand on June 25, 1957, and further alleges that the controller has not paid the sum of $155.93 to the United States, Riddell or Westberg. It gives as the sole reason for non-payment, that the United States had not complied with the requirements of Section 710 of the California Code of Civil Procedure, which provide that a judgment-creditor may garnish the salary of a state employee by filing an authenticated abstract of the judgment with an affidavit stating the exact amount then due. (R. 4-5.) In his complaint, the controller expressly disclaims any interest in the money except his interest in making payment "only to the proper party." (R. 6.) The Hoye complaint further alleges that the enforcement of the levy would cause the controller to breach his duty as a public official and make him personally liable for any money paid to the United States. Ac-

cordingly, the complaint prays for an order, determining that the controller is not bound by the levy or final demand, that the levy and final demand be quashed, and that the court determine that the controller is bound to pay to the United States any money due to other persons, only upon the filing of the abstract of the judgment and affidavit as required by Section 710 of the California Code of Civil Procedure. (R. 6.)

On November 8, 1957, the United States filed a notice of motion to intervene on the ground that it had not consented to be sued and was not subject to the jurisdiction of the Court as a defendant, that leave to intervene be authorized and that the United States has an interest in the matter being litigated and is a necessary and proper party to a complete determination. It also appended its proposed complaint in intervention. (R. 12-18.) At the same time, as defendants to the Hoye complaint, the United States and Riddell filed a motion to dismiss the action for lack of jurisdiction over the United States and over the subject matter, and because the District Director was not a proper party. (R. 18-19.)

On February 6, 1958, after hearing on all of the motions, the District Court granted the motions to dismiss the Hoye complaint and also granted the Government's motion to intervene. (R. 21.) The formal order permitting intervention by the United States was entered the same day. (R. 20-21.) The formal order granting the motion to dismiss was entered on March 10, 1958, reading as follows (R. 27):

ORDER GRANTING MOTION TO DISMISS

> Good Cause Appearing Therefor, it is hereby ordered that the complaint in the above-entitled action may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; however, this is not a final order under Fed. R. Civ. P. 54(b), since the United States of America has filed its complaint in intervention.

In the meantime, the Government had filed an amended complaint in intervention, alleging two causes of action: *First*, against appellant Hoye for $155.93 and interest and costs based on his refusal to surrender the property or rights to property of the taxpayer, in accordance with the notice of levy and final demand (R. 22-24); and *second*, against Hoye, the City of Los Angeles and the taxpayer for foreclosure of the tax lien. (R. 24-26). The jurisdiction of both causes of action is expressly rested upon 28 U.S.C., Sections 1340, 1345, and Sections 6332, 7401 and 7403, Internal Revenue Code of 1954. On March 17, 1958, Hoye as controller and individually filed a notice of appeal from the order of March 10, granting the motions to dismiss his complaint. (R. 28-29.) A motion to dismiss this appeal was denied by this Court July 2, 1958.

SUMMARY OF ARGUMENT

I. The order of the District Court, dismissing the complaint for declaratory judgment and to quash the levy is not an appealable order. The effect of the

Government's suit in intervention was to raise multiple claims against the controller on his personal liability for failure to surrender the levied property and against the controller, the City and the taxpayer to foreclose the lien on the levied property. Hence, Rule 54(b) is applicable, and the negative certificate of the District Court that its order adjudicating less than all of the claims was not final is conclusive. Aside from Rule 54(b), the order is not appealable since it does not determine the main issues in litigation. The issue presented by the dismissed complaint—whether a federal tax levy on accrued wages of municipal employees is ineffective for failure to comply with the state procedure for garnishment of salaries of such employees—is precisely the issue presented by the Government's suit to recover on the levy by recourse to the controller's personal liability for failure to honor the levy. In any case, if other issues are presented by the dismissed complaint, they are fully embraced by the second cause of action of the Government's suit, to adjudicate all claims to the levied property in the foreclosure of its lien. The order does not determine any separate, collateral issues to the prejudice of appellant, pending final determination of the main issues. It has been authoritatively held that an order denying a motion to quash an attachment is not appealable, since in such a situation the rights of all parties can be adequately protected while the litigation on the main claim proceeds.

II. If the order is appealable, the dismissal of the suit to quash the levy was correct. The suit is one

to enjoin the collection of taxes prohibited by basic policy set forth in the express provisions of Section 7421 of the 1954 Internal Revenue Code and the Declaratory Judgments Act, 28 U. S. C., Section 2201. Contrary to appellant's assertion, no jurisdiction is afforded to the District Court by the Declaratory Judgments Act, especially in view of the express exception from its purview of any controversy "with respect to Federal taxes." Appellant is not a person claiming ownership of property who is allowed to sue to enjoin the taking of his property to satisfy the tax obligations of another. On the contrary, appellant has expressly disclaimed any ownership interest in the property; his interest is only that of a stakeholder or trustee, which does not justify any exception to the basic policy prohibiting suits to enjoin the collection of taxes.

Nor is jurisdiction of the District Court afforded by 28 U.S.C., Section 2463, which prohibits replevy of distrained property. No question of liability of the controller to third persons is presented here, since concededly the levied debt is owing to the delinquent taxpayer and payment to the Government pursuant to the levy is a complete defense as against claims of taxpayer. There is no basis for the suggestion made in this Court for the first time of a possible interest by taxpayer's wife in the money levied upon. In any event, such a claim is inconsistent with appellant's pleading and cannot be raised for the first time on appeal. Moreover, the second cause of action in the Government's suit now pending in the District Court will result in a final adjudication of all claims to the levied property.

ARGUMENT

I.

The Order Of The District Court Dismissing The Complaint To Quash The Levy, In View Of The Permission Granted The United States To Intervene And File A Complaint In Intervention To Enforce The Lien, Is Not An Appealable Order

In Point I of his brief (pp. 9-11) appellant argues that the order appealed from is a final and appealable order. Since we do not agree and since appellant raises the issue, we express our views in this Point I and request respectfully permission to renew our motion to dismiss this appeal, (heretofore denied, as stated above on July 2, 1958).

This appeal comes to this Court under the following circumstances: the United States, by its District Director of Internal Revenue, filed a notice of levy to enforce its lien for income taxes due and unpaid upon property or rights to property of the taxpayer in the hands of the controller of the City of Los Angeles. The controller, conceding that he held accrued wages, payable to the taxpayer in the full amount of the lien, refused to surrender the property upon the ground that the United States had failed to comply with the state procedure for the collection of a debt owed to a debtor in the hands of a municipal official. Instead, the controller, holding on to the funds, filed a complaint in the District Court to quash the levy, seeking a declaration that the United States was bound to follow the state procedure. On its view that the court had no jurisdiction of this suit, the United States filed an authorized motion to

intervene, with an application for leave to file a complaint in intervention to obtain payment and to enforce the lien. The District Court granted the Government's motion to intervene with leave to file such a complaint, and dismissed the controller's complaint. The controller has not appealed from the order of the District Court granting the intervention, but has only appealed from the order dismissing his complaint.

In this context, we submit that the order dismissing the complaint to quash the levy, while allowing the litigation to proceed upon the Government's suit to enforce the lien and levy, is not an appealable order under 28 U. S. C., Section 1291, Appendix, *infra*. Under Rule 54(b) of the Federal Rules of Civil Procedure, Appendix, *infra*, the negative certificate of the District Court that the order is not a final one is conclusive. Aside from Rule 54(b), the order is not appealable, since it is not a final order on the main issues in litigation, nor does it finally determine, to the prejudice of appellant, any collateral question distinct and separate from the main issues in litigation, still pending before the District Court.

A. ***Under Rule 54(b), the negative certificate of the District Court that its order is not final is conclusive***

The effect of the Government's complaint in intervention is to raise multiple claims (1) against appellant on his personal liability for failure to surrender the levied property; and (2) against appellant, the City and the taxpayer to foreclose the lien

on the levied property. Hence, Rule 54(b) is applicable, and the negative statement of the District Court as to the non-appealability of its order dismissing the Hoye complaint is conclusive. The conclusive nature of a negative statement of a District Court, that its order denying less than all of the claims in a case presenting multiple claims is not appealable, is settled and needs no argument in this Court. *Island Service Co.* v. *Perez*, 255 F. 2d 559; *Walter W. Johnson Co.* v. *Reconstruction Finance Corp.*, 223 F. 2d 101. The case of *Audi Vision, Inc.* v. *R. C. A. Mfg. Co.*, 136 F. 2d 621 (C. A. 2d), and the other cases cited by appellant dealing with the partial adjudication of multiple claims (Br. 8-11) are not in point, since they were decided without consideration of the 1946 amendment to Rule 54(b) of the Federal Rules of Civil Procedure, which conferred conclusive authority upon the District Court to negative the appealability of such an order. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427.

B. ***Aside from Rule 54(b), the order of the District Court is not appealable since it does not determine the main issues in litigation nor any separate collateral question, to the prejudice of appellants, pending final determination of the main issues***

Aside from Rule 54(b), the order of the District Court dismissing the Hoye complaint to quash the levy, while maintaining the litigation on the Government's suit to enforce the levy, is not appealable. It does not determine the main issues raised by the Hoye complaint. Indeed, the Hoye complaint raised only one issue: whether a federal levy upon the sal-

ary of a tax-delinquent municipal employee must conform to the requirements of state law with respect to the garnishment of the salaries of municipal employees. That is precisely the issue presented in the first cause of action in the Government's suit, now pending in the District Court, to enforce the levy by recourse to the personal liability of the controller, upon his failure to honor the levy. *Sims* v. *United States*, 252 F. 2d 434 (C. A. 4th), pending on petition for certiorari. This liability of the controller is simply a necessary incident to the validity of the levy, just as a garnishee becomes personally liable for failure to honor a garnishment. *Brashear* v. *West*, 1 Pet. 607, 618; California Code of Civil Procedure, Section 544. The only difference is that, in a case of a federal tax levy, the notice of levy takes the place of a judgment or other processes under state procedure. *Sims* v. *United States*, *supra; United States* v. *Eiland*, 223 F. 2d 118, 121 (C. A. 4th). In any event, the Government's second cause of action, to foreclose the lien and recover on the levy, embraces all possible issues raised by the Hoye complaint, including "the proper person to whom payment of the funds levied upon should be made." (Br. 9.) *United States* v. *Graham*, 96 F. Supp. 318 (S.D. Cal.), affirmed, *sub nom. State of California* v. *United States*, 195 F. 2d 530 (C. A. 9th), certiorari denied, 344 U. S. 831; *United States* v. *Newhard*, 128 F. Supp. 805 (W.D. Pa.).

No appealable order, deciding a collateral question distinct from the main issues to the prejudice of appellant pending determination of the main issue,

is presented by this appeal. Such an appeal is allowed as an exception to the requirement that an appealable order finally determine the issues in litigation, only where an order, though not a final order on the main issues, determines a separate, collateral question, which will escape review on the appeal from an adjudication of the main issues, and which in the meantime inflicts irreparable injury upon the appellant. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541; *Swift & Co.* v. *Compania Colombiana*, 339 U. S. 684. The instant order dismissing the suit to quash the levy is analogous to an order overruling a motion to quash an attachment, and in *Swift & Co.* v. *Compania Colombiana*, *supra*, the Court held that such an order was not appealable, since as the Court said (339 U. S., p. 689) "In such a situation the rights of all parties can be adequately protected while the litigation on the main claim proceeds." [1]

The appellant here cannot show any prejudice from the dismissal of his suit to quash the levy while the Government's suit to enforce the levy proceeds in the District Court. His position remains the same. He holds the funds pending determination of the validity

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[1] While the decision in *Swift & Co.* was on the appealability of an order *granting* a motion to quash an attachment, the above quoted holding as to the non-appealability of a ~~motion~~ *overruling* a motion to quash an attachment is not dicta, but essential to the decisive reasoning of the case, that a collateral order is appealable only if it escapes review of the final determination of the litigation and imposes irreparable injury on the appellant. *Great Lakes Towing Co.* v. *St. Joseph-Chicago S.S. Co.*, 253 Fed 635 (C.A. 7th) is an earlier decision also holding that a motion *denying* an attachment lien is appealable.

of the levy, and his personal liability for the amount of the levy is, in these circumstances, purely technical.[2] In short, all that the District Court has done by its order dismissing the Hoye complaint is to direct that the issues of the validity of the Government's levy, challenged by the Hoye complaint, be determined in the Government's suit to enforce the levy. This order on any view is not an appealable one. Furthermore, regardless of the Government's suit in intervention, the Hoye complaint to quash the levy required dismissal because, as we shall now show, it is a prohibited suit to enjoin the collection of taxes by way of a declaratory judgment.

II.

If The Order Is Appealable, The District Court Correctly Dismissed The Complaint

This branch of the case involves the jurisdiction of the District Court over the Hoye complaint. We submit that the suit is barred by express statutory prohibitions; there is no basis for jurisdiction as asserted by appellant, either under 28 U. S. C., Sections 2201 or 2463, Appendix, *infra*.

A. *The suit is barred by express statutory prohibitions that have been repeatedly enforced by the courts*

The suit by the controller is on its face a suit to enjoin the collection of federal income taxes and for declaratory judgment. The District Court has no

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[2] The controller's liability for interest and costs is exactly the same, if, on the merits, he had lost his suit to quash the levy, as it is, if the Government's suit to enforce the levy proves successful.

jurisdiction over such a suit because it is expressly barred by the statutory prohibitions against such suits set forth in Section 7421 of the 1954 Internal Revenue Code and the Declaratory Judgments Act as amended, 28 U. S. C., Section 2201. This statutory rule prohibiting injunction of tax collections is founded upon a basic policy to protect the federal tax powers essential to the Government, and was first enacted by the Act of March 2, 1867, c. 169, 14 Stat. 471, Sec. 10. It has been repeatedly enforced by the courts and constitutes an established principle of federal tax law. *Dodge* v. *Osborn*, 240 U. S. 118; *Graham* v. *DuPont*, 262 U. S. 234, 254-255; currently reaffirmed in *Flora* v. *United States*, 357 U. S. 63, 75.[3]

B. *The District Court does not have jurisdiction under 28 U. S. C., Section 2201, the Declaratory Judgments Act*

Appellant's assertion that the District Court had jurisdiction of the Hoye complaint under the Declaratory Judgments Act (Br. 12-16) ignores the explicit statutory bar, contained in the exception to that Act, of any controversy "with respect to federal taxes."

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[3] The same prohibition is commonly found in state laws to protect state revenue. California Constitution, Art. 13, Sec. 15; *Helms Bakeries* v. *State Bd. of Equal.*, 53 Cal. App. 2d 417, 128 P. 2d 167, certiorari denied, 318 U. S. 756; *Casey* v. *Bonelli*, 93 Cal. App. 2d 253, 208 P. 2d 723. And federal law prohibits any action in the federal courts to enjoin the collection of state taxes, where there is an adequate remedy under state law. 28 U.S.C., Section 1341. See *Great Lakes Co.* v. *Huffman*, 319 U. S. 293.

The predecessor of Section 2201, 28 U. S. C., was Section 274D of the Judicial Code, which was amended by Section 405, Revenue Act of 1935, c. 829, 49 Stat. 1014, to remove from its operation any controversy "with respect to Federal taxes." The Senate Report on the Revenue Act of 1935 states (S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939) (1939-1 Cum. Bull. 651, 657)):

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

The case of *Tomlinson* v. *Smith*, 128 F. 2d 808 (C. A. 7th), cited by appellant (Br. 12-14), affords him no support. There, an action by a mortgagee to declare the mortgage lien superior to that of the United States and to restrain the Collector from proceeding with the distraint was permitted to be maintained. There, the tax was not owed by the plaintiff and the holding in substance was that the prohibition against suits to enjoin the collection of taxes

does not "prevent judicial interposition to prevent a collector from taking the property of one person to satisfy the tax obligation of another." *Raffaele* v. *Granger*, 196 F. 2d 620, 623 (C. A. 3d). See also *Long* v. *Rasmussen*, 281 Fed. 236 (Mont.); *Rothensies* v. *Ullman*, 110 F. 2d 590 (C. A. 9th); *Seattle Ass'n of Credit Men* v. *United States*, 240 F. 2d 906 (C. A. 9th); *Cannon* v. *Nicholas*, 80 F. 2d 934 (C. A. 10th). But in each of these cases, the suit was brought by the person claiming ownership of the property, who was threatened with immediate loss of the property by imminent sale or distraint of the property by the United States for the tax obligations of another.

Here, however, the appellant controller makes no claim that he or the City of Los Angeles has any property in the debt which has been levied upon; the suit is not in protection of any property interest in the debt. (R. 6.) He has none and further he admits in his complaint that the City is indebted to taxpayer and that as controller he is holding the money because of the claim of the United States and of the Director. (R. 4.) The holding of the *Tomlinson* case and the other cases immediately above cited obviously has no application to the instant facts and affords no warrant for the action brought by the appellant.

It is therefore respectfully submitted that the holding to the contrary by the District Court (Judge Hall) in *Hoye* v. *United States*, 109 F. Supp. 685 (S. D. Cal.) (1953), is in error and the later ruling of the same District Court in the order here appealed from (Judge Tolin) is correct. In the cited case,

Judge Hall relied on *Tomlinson* v. *Smith*, *supra*, although he noted that in that case the plaintiff claimed a prior lien. Nevertheless, the court considered the situation in *Tomlinson* analogous to the case before him, where the City of Los Angeles merely held as trustee the money which was there due to the taxpayer, its employee or pensioner. (p. 686.) On the contrary, we submit that the two situations are not analogous. Indeed, the prohibition against suits restraining the collection of taxes would be an empty form, if all persons holding property concededly belonging to the taxpayer—and in which the holder himself claims no interest—might prevent distraint and collection by bringing action for injunction or declaratory judgment.

The other ground upon which Judge Hall proceeded in the cited case was that, had the controller recognized the levy by the Collector, he would still be liable to pay the same amount again to taxpayer under the terms of Section 710 of the California Code of Civil Procedure, since there was not filed with him a copy of a judgment in favor of the Collector. As already pointed out, it has recently been held that similar state law provisions must yield to the federal statutes with respect to collection of taxes. *Sims* v. *United States*, *supra*; *United States* v. *Newhard*, *supra*. See also Rev. Rul. 55-227, 1955-1 Cum. Bull. 551.

Moreover, to the extent that the Government seeks only by its levy to obtain what is due to taxpayer from his debtor, the City of Los Angeles, this Court, in accord with the Fourth Circuit has squarely held that "payment to the Government pursuant to levy

and notice is a complete defense to the debtor against any action brought against him on account of the debt." *Bank of Nevada* v. *United States*, 251 F. 2d 820, 828, certiorari denied, 356 U. S. 938; *United States* v. *Eiland*, 223 F. 2d 121, 122 (C. A. 4th).

The ruling by Judge Hall in *Hoye* v. *United States*, *supra*, was technically a denial of a motion by the Government and the Collector to dismiss the complaint and, hence, was not appealable. The records of the Department of Justice show that the Government filed an answer, but the case never went to trial and was dismissed on stipulation following payment of the tax by the taxpayer.

C. *The District Court does not have jurisdiction under 28 U. S. C., Section 2463*

Section 2463 is a further reinforcement of the prohibition against suits to enjoin the collection of taxes; its express purpose is to prohibit replevy of distrained property. It assuredly does not carve out any exceptions to the prohibition of Section 7421 or, of the Declaratory Judgments Act; at most it simply affords an affirmative basis for jurisdiction of a suit that is not prohibited. *Seattle Ass'n of Credit Men* v. *United States, supra.*

Appellant's contention that jurisdiction is afforded by Section 2463 rests upon a two-fold assertion that such a suit is maintainable where (a) "the holder of the property levied upon would not be exonerated from personal liability by acceeding to the demand", and (b) where "the property levied upon belonged to a third party and was being taken to satisfy the taxes of another." (Br. 17.) Neither ground is

present here. On the first ground, appellant cites *United States* v. *Penn Mut. Life Ins. Co.*, 130 F. 2d 495 (C. A. 3d), and *United States* v. *Winnett*, 165 F. 2d 149 (C. A. 9th). These cases are, however, not in point. *Penn Mut. Life Ins. Co.* was a suit by the United States against an insurance company to enforce a levy upon it for the value of taxpayer's interest in certain policies. The court dismissed the suit on the ground that the insurer did not hold any ascertainable property or property rights of the taxpayer. In *Winnett*, the suit was also by the United States against the maker of a note due a delinquent taxpayer, to enforce a levy thereon, and the holding of the case is confined to a ruling that the taxpayer's leviable interest in the note was subject to a prior written agreement endorsed on the note, granting a set-off to the maker.

Neither case in any way touches upon the issue here, whether a person holding levied property of taxpayer and disclaiming any interest in the property can sue to enjoin the levy. The statements in both cases, that enforcement of the lien would not exonerate the taxpayer's debtor from liability to others on account of their interest in the property, referred solely to the accepted rule that the United States as creditor can levy upon the debt or other property of a taxpayer only to the extent that the property belongs to the taxpayer, and that accordingly if the person levied upon paid over property of others he would also be liable to them. There is no such problem in the case at bar; appellant himself alleges in his complaint that the property levied upon was accrued wages, due and "payable to said

Richard A. Westberg", the taxpayer here. (R. 4.) As already stated, to the extent that the Government only seeks by its levy to obtain what was due to the taxpayer from his debtor, the City of Los Angeles, payment to the Government is a complete defense to the debtor. *Bank of Nevada* v. *United States*, *supra; United States* v. *Eiland*, *supra.*

Appellant's second asserted ground for jurisdiction under Section 2463, that he was justified in refusing to surrender the wages due and payable to the taxpayer because the wages might, by agreement between the taxpayer and his wife, be her separate property (Br. 7, 18-20), is equally pointless. Indeed, appellant is precluded from asserting this ground, since he did not allege any such question in his complaint, which as noted, flatly stated that the wages were payable to the taxpayer; nor was this contention raised in the argument on the motions below. *Dally* v. *Commissioner*, 227 F. 2d 724, 726 (C. A. 9th). Moreover, the alleged dilemma with which appellant is supposedly confronted by the possibility of taxpayer's wife's claim to his wages, by private agreement between them, is unreal. Under California law, such a transfer is void against creditors without notice, *Wilson* v. *Grey*, 49 Cal. App. 2d 228, 121 P. 2d 514; *Ramsdell* v. *Fuller*, 28 Cal. 37, and under federal law, such an inchoate right could not defeat the lien of the United States for taxes. (*Bank of Nevada* v. *United States*, *supra; United States* v. *Heffron*, 158 F. 2d 657 (C. A. 9th) certiorari denied 331 U.S. 831.

But even if the possibility of a possible wife's claim could now be raised for the first time on appeal and even if it had any possible substance, it would not,

under these hypothetical circumstances, afford any basis for appellant's suit to quash the levy. The claim, if it exists, is one for its owner to assert, and as far as the appellant's suit is concerned, its possible existence is a good reason for the dismissal of appellant's suit to make way for the Government's suit now pending before the District Court in which a final adjudication of all claims to the property levied upon can be made. See *United States* v. *Stockyards Bank of Louisville*, 231 F. 2d 628, 631-632 (C. A. 6th). That case, cited by appellant (Br. 19), supports the instant decision of the court below in dismissing appellant's suit to quash the levy. The other cases cited by appellant in the closing of his brief (p. 20), *Rothensies* v. *Ullman*, *supra; Seattle Ass'n of Credit Men* v. *United States*, *supra; Cannon* v. *Nicholas*, *supra; Raffaele* v. *Granger*, *supra*, have already been discussed. They are not in point because, as we have shown, each is a case in which the court permitted a suit to enjoin the collection of taxes, brought by a person claiming that the Government was taking his property for the payment of the tax obligation of another.[4]

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[4] It may be noted that in the cited cases where the exceptional suit to enjoin the collection of taxes by a third party was allowed, the Government did not, as here, file a complaint in intervention, but litigated the issues of its right to collect the taxes in the suit to quash the levy. It may well be that, even in these cases, had the Government filed an intervening complaint to collect the taxes and adjudicate the claims to the property under Section 7403, a dismissal of the third party suit would, as here, be both correct and, under the reasoning of *Swift & Co.* v. *Compania Colombiana*, *supra*, non-appealable since the enforcement of the lien would obviously be stayed pending the outcome of the Government's

The appellant has disclaimed any interest in the property as such; his interest, as already noted, is simply that of a stakeholder or trustee, and that is not enough to justify an exception from the fundamental policy prohibiting suits to enjoin the collection of taxes.

CONCLUSION

The appeal from the order of the District Court should be dismissed, or if the order is appealable, it is correct and should be affirmed.

Respectfully submitted,

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action and the rights of the parties adequately protected "while the litigation on the main claim proceeds." The entertainment of a suit for declaratory judgment is discretionary and in the exercise of a sound discretion the court may decide to permit the issues to be adjudicated in the action brought by the United States. *New York Milk Shed Transportation* v. *Meyers*, 144 F. Supp. 174 (N.D. N.Y.).

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Supp. II, Sec. 6321.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his

delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) *Person Defined.*—The term "person", as used in subsection (a) includes an officer or em-

ployee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U. S. C. 1952 ed., Supp. II, Sec. 6332.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.* — The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court

in respect to the interests of the parties and of the United States.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7403.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7421.)

28 U. S. C.:

SEC. 1291 [as amended by Sec. 48 of the Act of October 31, 1951, c. 655, 65 Stat. 710]. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

SEC. 2201 [as amended by the Act of August 28, 1954, c. 1033, 68 Stat. 890]. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested

party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SEC. 2463. *Property taken under revenue law not repleviable.*

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Federal Rules of Civil Procedure:

RULE 54.

* * * *

(b) [as amended December 27, 1946] *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

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